In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1297

BOBBY DEAN WINE,

Petitioner

v.

STATE OF INDIANA and
THEODORE J. SENDAK, as
Attorney General of the
State of Indiana

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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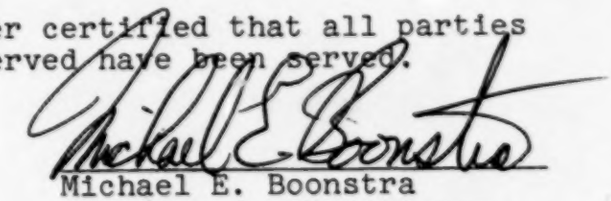
PROOF OF SERVICE

I, MICHAEL E. BOONSTRA, Attorney for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of February, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Attorney General, THEODORE J. SENDAK, Attorney General of the State of Indiana, by mailing a copy in a duly addressed envelope, with First Class postage prepaid, to Attorney General THEODORE J. SENDAK, Statehouse, Indianapolis, Indiana 46204.

To THEODORE J. SENDAK
Attorney General of the State of Indiana
Statehouse
Indianapolis, Indiana 46204

It is further certified that all parties required to be served have been served.



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AUTHORITIES

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The Petitioner, BOBBY DEAN WINE, prays that a writ of certiorari issue to review the denial of transfer without opinion of the Supreme Court of the State of Indiana rendered in these proceedings on the 22nd day of November, 1978.

OPINIONS BELOW

The denial without opinion of Petitioner's petition for transfer, as yet unreported, appears at Appendix A, infra, page 36. The judgment and ruling on Petitioner's motion to correct errors of the Circuit Court of Huntington County, is unreported, and appears at Appendix B, infra, page 37. The Second District Court of Appeals of the State of Indiana affirmed the judgment of the Circuit Court of Huntington County and a memorandum decision issued in support of said judgment appears at Appendix C, infra, page 40. The Second District Court of Appeals of the State of Indiana denied rehearing on August 25th, 1978, without opinion and said denial appears at Appendix D, infra, page 54.

JURISDICTION

The order of the Supreme Court of the State of Indiana was entered on the 22nd day of November, 1978. See Appendix A, page 36, infra. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The State of Indiana charged Petitioner under I.C.35-1-29-1 dealing with accessory before the fact to bank robbery. The questions presented before this Court are:

1. Whether Petitioner was denied his right to a speedy trial as guaranteed by United States Constitution, Amendment VI.

2. Whether Petitioner was denied his right to a speedy trial as guaranteed by Indiana Constitution, Article I, Scetion 12.

3. Whether the evidence introduced by the State at the trial court level was sufficient to sustain a conviction according to applicable law of the State of Indiana.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

Indiana Constitution, Article I, Section 12:

> "Justice shall be administered freely and without purchase; completely, and without denial, speedily, and without delay."

Criminal Rule 4 of the Indiana Rules of Criminal Procedure:

> "If any defendant held in jail on indictment or affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except for a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during the seventy (70) calendar days because of congestion of the Court calendar. Provided, however, that in the last mentioned circumstance, the prosecuting attorney shall file a timely motion for contiruance as set forth in subdivision (a) of this rule."

STATEMENT OF THE FACTS

On July 20, 1976, there was filed with the Clerk of the Huntington Circuit Court an information charging the Petitioner, BOBBY DEAN WINE, with the crime of accessory before the fact to bank robbery. On August 9, 1976, an amended information was filed charging the Petitioner with the same crime. On August 9, 1976, Petitioner filed his motion for a speedy trial which motion was granted and the cause set for trial to jury at 9:30 a.m. on October 5, 1976. On September 22, 1976, the Court found that a possible conflict of interest existed in the representation of the Petitioner by the appointed attorneys and the Court revoked the appointment of said attorneys and appointed Stephen J. Michael to represent the Petitioner. The Court further found that the newly appointed attorney would not have sufficient time to prepare the Petitioner's defense and, upon its own motion, set the cause for trial to a jury on November 8, 1976, because of cases which had been previously set and which could not be moved from their settings. Since the new trial date was beyond the seventy (70)-day time limit for speedy trial as provided by C.R.4(B), the Petitioner stated in open court that the Court's continuance of Petitioner's trial date was not to be construed as a waiver of the Petitioner's right for an early trial pursuant to the provisions of C.R. 4(B). Affidavit of John T. Snively.

On September 23, 1976, Stephen J. Michael declined his appointment as attorney for Petitioner, and the Court appointed Michael E. Boonstra, to represent the

Petitioner. On October 19, 1976, Michael E. Boonstra filed his written appearance for the Petitioner together with his Motion for Discharge and Motion to Dismiss. The Motions were set for hearing on November 1, 1976, on which day the Petitioner filed the affidavit of John T. Snively. The evidence was heard and the Court overruled and denied the Motions.

The case was tried to a jury. During the State's case the State offered into evidence pictures of the sawed-off shotgun used by the principal in perpetrating the bank robbery, to which the Petitioner objected. The Court overruled the objection and the photographs of the sawed-off shotgun were admitted into evidence.

After due deliberation the jury returned a verdict of guilty to the crime of Accessory Before the Fact to Bank Robbery. Petitioner was committed to the Department of Corrections for classification and confinement for a period of ten (10) years. Petitioner filed his Motion to Correct Errors which motion was overruled and denied.

REASONS FOR GRANTING THE WRIT

I. Denial of Petitioner's Right to a Speedy Trial According to the United States Constitution, Amendment VI.

The United States' Constitution guarantees certain fundamental rights to an accused in a criminal prosecution. Among those rights insured by the Constitution is the right to a speedy trial. U.S.C.A. Const. Art. 3, §2, Cl. 3, Amend. VI; Baker v. Wingo (1972) 407 US 514, 33 L Ed. 101, 92 S Ct. 2182.

> "The Sixth Amendment's guarantee to an accused of the right to a speedy trial is fundamental and is imposed by the due process clause of the Fourteenth Amendment of the United States." Baker v. Wingo, Supra.

> "The Sixth Amendment right to a speedy trial is among those fundamental constitu ional rights made applicable to the States through the due process clause of the Fourteenth Amendment." Prince v. State of Alabama (1975) 507 F. 2d 693.

> "The right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." Moore v. Arizona (1973) 414 US 25, 38 L Ed. 2d 183, 94 S Ct. 188.

The difficulty with a right that is phrased in relative and subjective terms is in quantifying and establishing definite parameters for said right. However,

application of the Sixth Amendment right to a speedy trial, to a degree, has been reduced to objective standards by case law precedent. In the landmark case of Baker v. Wingo, Supra, the Supreme Court established both a functional test and objective guidelines for use in determining whether or not an individual's right to a speedy trial has been denied. The test utilized by Baker has been labeled the "balancing test". The "balancing test", in simplistic terms, balances the right of the accused to a speedy and fair trial against the right of society to bring to trial and convict offenders of the law at all costs. The "balancing test" was a fixture of criminal law prior to its clarification in Baker and remains the principal standard in interpreting the speedy trial provision of the Sixth Amendment today. Baker v. Wingo, Supra; United States v. Phillips (1973) 482 F. 2d 191; United States v. Lawson (1975) 545 F. 2d 557; United States v. Avalos (1976) 541 F. 2d 1100.

Baker went one step further after clarifying the "balancing test" and established a set of guidelines which should be used in weighing the respective rights which necessarily must conflict when applying the "balancing test". In Baker, the Supreme Court stated that:

> "Some of the factors which Courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial are (1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant."

Like the "balancing test" the guidelines pronounced in Baker also became fixtures in American judicial thought. United States v. Dreitzler (1978) 577 F. 2d 539; United States v. Edwards (1978) 577 F. 2d 883; United States v. Ewell (1965) 383 US 116, 15 L Ed 2d 627, 86 S Ct. 773; United States v. Netterville (1977) 557 F. 2d 903; United States v. Avalos, Supra; United States v. Lawson, Supra; United States v. Phillips, Supra.

Before examining the four factors as they relate to the case at bar, it should be noted that because the "balancing test" requires a great deal of discretion, the Court should indulge every reasonable presumption in favor of the Petitioner, where substantial rights are involved.

> "Courts should indulge every reasonable presumption against waiver and they should not presume acquiescence and loss of fundemental rights." Baker v. Wingo, Supra.

The first factor to be examined for the purpose of applying the "balancing test" is "length of delay". In other words, was there a significant delay between the charging of the Petitioner and the trial date. In the case at bar, the issue of denial of Petitioner's right to a speedy trial sprung from the Respondent's failure to adhere to Criminal Rule 4 of the Indiana Rules of Criminal Procedure, which reads in part as follows:

> "If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion,

"except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during the seventy (70) calendar days because of the congestion of the Court calendar. Provided, however, that in the last-mentioned circumstance, the Prosecuting Attorney shall file a timely motion for continuance as set forth in Subdivision (A) of this rule."

Since it has always been permissable for States to quantify the period of time in which a Defendant must be brought to trial, by the States' own criminal rules, the length of delay in this case was sufficient to bring up the question of the denial of the Petitioner's right to a speedy trial.

> "States are free to prescribe a reasonable period consistent with constitutional standards during which an accused must be forwarded his right to a speedy trial..." Baker v. Wingo, Supra.

> "There is no constitutional basis for holding that the right to a speedy trial cannot be quantified into a specific number of days or months." Baker v. Wingo, Supra.

However, length of delay is but one factor that is to be weighed in determining the Petitioner's right. The Court should also consider whether or not the Respondent had a substantive reason for failing to try the Petitioner within a reasonable length of time. In the case at bar, the trial

court decided sua sponte that Petitioner's new counsel would need additional time to adequately prepare for trial. Whereas, such considerations as congestion of the trial court's calendar, complexity of legal and factual issues, and availability of evidence may be considered by the trial court in allowing delay, the trial court should not be permitted to violate a fundamental right of a defendant based upon mere speculation. United States v. Avalos, supra.

If the Court bears in mind, that the Petitioner must be given the benefit of every reasonable doubt when applying the "balancing test" then the first two (2) factors considered by the "balancing test" must necessarily weigh in favor of the Petitioner's position.

Perhaps the two (2) most substantial factors of the "balancing test" and clearly the two factors interpreted in favor of the Respondent by the lower courts in this case are "the need for assertion of the right to a speedy trial by the defendant" and "the amount of prejudice to the defendant occasioned by the delay". In the case at bar, it was argued by the Respondent that the Petitioner did not adequately assert his right to a speedy trial and, in addition, acquiesced in any delay by not objecting to the latter trial date when he first learned of it. The argument is in error for two (2) reasons: (1) Petitioner need not assert his right to a speedy trial in order to preserve said right; and, (2) Petitioner did in fact make an open assertion of said right.

It is clear in the law that Petitioner's assertion of his right to a speedy trial is not a requisite to establishing a deprivation of Petitioner's Sixth Amendment right.

> "Sixth Amendment rights are fundamental so failure to assert them does not constitute waiver." United States v. Netterville, Supra.

The reason why the Petitioner need not assert his right in order to preserve it is because the burden of affording the Petitioner a speedy trial rests squarely upon the shoulders of the Respondent.

> "The State has a duty to bring a defendant to a speedy trial..." Baker v. Wingo, Supra.

> "Ultimate responsibility for a speedy trial rests with the government rather than the defendant, as a defendant has no duty to bring himself to trial." United States v. Greene (1975) 526 F. 2d 212.

If Petitioner need not assert his right to a speedy trial in order to avail himself of his Sixth Amendment right, then any overt assertion by the Petitioner can only act in favor of said Petitioner.

> "A defendant's assertion of his right to a speedy trial is entitled to strong evidentuary weight in determining whether he has been deprived of this right." Baker v. Wingo, Supra.

In the case at bar, Petitioner's first attorney withdrew from the case prior to the trial date. Upon withdrawal from the case, said attorney filed with the Court an affidavit succinctly stating that Petitioner was not waiving his right to a speedy trial by changing counsel and was not acquiescing

in any delay. Clearly, this is an overt assertion within the meaning of Baker and, as such, is entitled to a "strong evidentuary weight" in determining if there was a deprivation of the Petitioner's Sixth Amendment right.

The final factor of the "balancing test" involves a determination of whether or not the Petitioner was prejudiced by the delay. The prejudice referred to in this factor is not restricted to prejudice as to the Petitioner's defense, but, includes many sociological prejudices as well.

> "Prejudice to a defendant caused by delay in bringing him to a speedy trial should be assessed by the Courts in light of the interest of the defendants which the right to a speedy trial was designed to protect, which interest include (1) the prevention of oppressive pre-trial incarceration, (2) the minimization of anxiety and concern of the accused, and (3) the desire to limit the possibility that the defense will be impaired." Baker v. Wingo, Supra; Moore v. Arizona, Supra; Smith v. Marby (1977) 564 F. 2d 249.

Like all the other factors previously discussed, prejudice is not essential to demonstrate deprivation of the Petitioner's right to a speedy trial. It is merely one of several factors the Court should weigh.

> "An affirmative demonstration of prejudice to the accused is not necessary to prove a denial of his constitutional right to a speedy trial." Moore v. Arizona, Supra.

Despite the fact that prejudice is not an essential element in determining whether or not there was a deprivation of the Petitioner's Sixth Amendment right, precedent would seem to indicate a certain degree of inherent prejudice present whenever there is a delay.

> "The Sixth Amendment guarantee of the right to a speedy trial recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial and for receiving a sentence..." Strunk v. United States (1973) 412 US 434 37 L Ed 2d 56, 93 S Ct. 2260

The case at bar is not an exception to the above rule and, thus, the Court should add the factor of "prejudice" to the Petitioner's already dominant side of the scales.

In review, the trial of the Petitioner in the case at bar was delayed beyond the statutory period established by the State of Indiana. The latter trial date was set sua sponte by the trial court and that delay cannot be attributed to the Petitioner or any acceptable judicial reason. The Petitioner, even though not required to, clearly asserted his right to a speedy trial per his first attorney's affidavit. Finally, Petitioner had been prejudiced by the delay according to the theory of "inherent social prejudice" found within the Strunk case. Therefore, Petitioner is entitled to an appropriate remedy. However, the Sixth Amendment right to a speedy trial is not similar to other fundamental rights when

it comes to the remedy stage. Unlike many such rights, a violation of the speedy trial right cannot be subsequently corrected.

> "The denial of the right to a speedy trial is unlike the denial of some of the other guarantees of the Sixth Amendment." Strunk v. United States, Supra.

Thus, if the Court decides that the Petitioner's Sixth Amendment right has been violated the only proper remedy is dismissal of the case. Strunk v. United States, Supra. Wherefore, the Petitioner prays that the Court grant his writ of certiorari and hear his case so as not to deny the Petitioner his due remedy for violation of his constitutional right.

II. Denial of the Right to a Speedy Trial According to Applicable State Law

The right to a speedy trial is guaranteed by both the United States and the Indiana Constitutions:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." United States Constitution, Amendment VI
>
> "Justice shall be administered freely and without purchase; completely, and without denial, speedily, and without delay." Indiana Constitution, Article I, Section 12.

The Indiana Supreme Court, pursuant to its supervisory rule making authority, created a procedural rule partially implementing the constitutional right to a speedy trial. The rule, C.R. 4, is not in itself a Sixth Amendment mandate but, rather, a procedural tool to measure the speedy trial right. State ex rel Demers v. Miami Circuit Court (1968) 249 IND. 616, 233 N.E.2d 777. The time limitations established in C.R. 4 create an irrebuttable presumption of prejudice based on the Indiana Supreme Court's interpretation of reasonableness. In Easton v. State, (1972) 258 IND. 204, 280 N.E.2d 307, the Court stated:

> "It [C.R. 4(A)] is in no sense a constitutional guarantee and is subject to reasonable exceptions, limitations and modifications, as we shall determine necessary to carry out its constitutional purpose." at p. 308.

In the case at bar, the applicable section of the rule is C.R. 4(B), which is as follows:

> "(B) Defendant in jail--Motion for early trial.
>
> (1) If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the Court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under sub-division (A) of this rule.
>
> (2) In computing the time comprising the seventy (70) calendar days under this C.R. 4(B), each and every day after the filing of such motion for early trial shall be counted, including every Saturday, every Sunday, and every holiday, excepting only that if the seventieth (70th) day should fall upon a Saturday, a Sunday, or a holiday, then such trial may be commenced on the next day thereafter, which is not a Saturday, Sunday, or a legal holiday.

"(3) The amendment to this C.R.4(B) shall be effective as to each and every motion for early trial filed on or after June 4, 1974."

In the case at bar, Petitioner made his original Motion for Speedy Trial on August 9, 1976, while Petitioner was in jail. The matter was then set for trial to a jury on October 5, 1976. This setting was within the seventy (70) day period, and the Respondent did not object to the trial setting.

On September 22, 1976, on a motion presented by the Petitioner's Court-appointed attorney, the trial court found that a possible conflict of interest existed in the representation of the Petitioner by the Court-appointed attorney, and revoked his appointment. The Court then appointed new counsel and, on its own motion, found that the new attorney would not have sufficient time to prepare Petitioner's defense. This was the Court's finding on September 22, 1976, before the newly appointed attorney even accepted the appointment, or, before he was even informed of the appointment. On the same day, the Court further found that because of cases which had been previously set, and which could not be moved, the Petitioner's case was set for trial on November 8, 1976, or a period of time greater than seventy (70) days from the date Petitioner originally made his Motion for a Speedy Trial.

The newly appointed attorney declined his appointment to represent the Petitioner, and on September 23, 1976, the Court appointed Michael E. Boonstra. On October 19, 1976,

Michael E. Boonstra filed his written appearance on behalf of the Petitioner and filed a Motion for Discharge and a Motion to Dismiss, based on the Court's denial of the Petitioner's right to a speedy trial. On November 1, 1976, Petitioner's Motions were heard and denied by the Court.

It is clear from the above facts that the Defendant has been denied his right to a speedy trial under C.R. 4(B). The only question which must be resolved by this Court is whether or not the delay is chargeable to the Petitioner, for C.R.4 also provides that a delay caused by actions of the Petitioner is deemed a waiver of his right to be tried promptly:

"(F) Time period extended. When a continuance is had on motion of the Defendant, or delay in trial is caused by his act, any time limitation contained in this rule shall be extended by the amount of the resulting period of such delay caused thereby. However, if the Defendant causes any such delay during the last thirty (30) days of any period of time set by operation of this rule, the State may petition the trial court for the extension of such period for an additional thirty (30) days." See also, Gross v. State (1972) 258 IND. 46, 278 N.E.2d 583 [A case decided prior to the adoption of C.R. 4(F)]

In the instant case, the record indicates that the delay in trial was made upon the Court's own motion when the Petitioner's original Court-appointed attorney withdrew from the case. The affidavit of this attorney,

John T. Snively, which was filed as part of the Petitioner's original Motion for Discharge and Motion to Dismiss, clearly shows that (1) Petitioner did not move for any continuance himself, and (2) that the affiant stated in open court that the trial court's action of continuing the trial beyond the seventy (70) days was not to be construed as a waiver of the Petitioner's right for a speedy trial. Thus the question is whether a change of counsel results in a delay chargeable to the Petitioner.

In Gross v. State, supra, the Supreme Court found that the trial court's appointment of a new pauper counsel and a continuance apparently granted on the Court's own motion, which continuance resulted in the trial being held beyond the then required time period of fifty (50) judicial days, was a delay:

> "Clearly for Appellant's benefit and intended to insure him his constitutional rights [to be assisted in his defense by competent counsel]." at p. 584

However, the Gross case is distinguishable from the case at bar. In Gross, Defendant's counsel withdrew twelve days prior to the trial. On the day of the trial, Defendant appeared without counsel and was apparently willing to be tried without the aid of counsel. At that point, the trial court, wishing to protect the Defendant's constitutional rights to be tried with the aid of counsel, "correctly decided that Appellant should be represented." at p. 584. The Supreme Court held that:

> "Since the delay was precipitated by Appellant's own actions and was for his benefit, the delay is chargeable to the Appellant." Citations omitted at p. 584-585

In the case at bar, Petitioner's Court appointed attorney was granted permission to withdraw on September 22, 1976, or thirteen (13) days prior to trial. On the same day, the Court appointed a new attorney and reset the trial, on its own motion, to November 8, 1976, deciding sua sponte, that the new counsel would not have enough time to prepare for trial. In Simpson v. State (1975) ____IND. APP. ____, 332 N.E.2d 112, this Court stated that:

> "The trial court may not delay setting the cause for trial on the assumption that the new counsel will require more preparation time."

The facts in Simpson, supra, were very similar to the case at bar. The Defendant, Simpson, was in custody when he filed his Motion for an early trial April 11, 1973. The rule in effect at that time provided for a trial to be held within fifty (50) judicial days from the date of such motion. On the twenty-eighth (28th) judicial day of the period Simpson requested that the appointment of his court-appointed counsel be vacated and that another attorney be appointed. On that same day, new counsel was appointed. Some two months after the running of the fifty (50) day-period, Simpson's new counsel filed a Motion for Discharge which motion was denied by the trial court. This Motion, incidentally, was the first appearance of record of the Defendant's new counsel. The trial court based its denial of discharge on the fact that the delays were initiated by the Defendant's own conduct.

The Court of Appeals, Third District, in reversing the trial court's decision held that:

> "There can be no claim that Simpson acquiesced in the setting of his trial outside the fifty (50)-day period..."

This Court then went on to distinquish Simpson from Gross in its holdings, that:

> "The mere change of counsel during the period of the rule does not in itself result in any delay in proceeding to trial."

This Court then went on to further distinguish Simpson from Gross:

> "In the Gross case, Defendant appeared on the day of trial, set within the period of the rule, and was willing to proceed without counsel. However, the trial court appointed counsel and continued trial two weeks. Defendant was charged with this delay because of his acquiescence in the appointment of counsel and the continuance. In Simpson's cause, approximate four (4) weeks [twenty-two (22) judicial days] remained during which these causes could have been set for trial. These causes were, however, not set for trial, and it is sheer speculation whether a continuance to allow for more preparation time would have been requested."

Simpson, supra, is exactly in point with the case at bar. In the instant case,

Petitioner did not acquiesce in a trial setting outside the period of the rule, indeed, Petitioner's counsel, upon being granted his withdrawal specifically stated to the trial court that the Petitioner did in no way waive his right to a speedy trial. The trial court, in what can only be characterized as sheer speculation, decided that the Petitioner's newly appointed counsel would not have sufficient time to prepare for trial, and therefore, the Court, on its own motion, set the cause for trial beyond the seventy (70) day limitation of C.R. 4(B).

The following day, counsel declined his appointment and the Court appointed Michael E. Boonstra, Just as in Simpson, as soon as Michael E. Boonstra filed his appearance on behalf of the Petitioner, he filed his timely Motion for Discharge and Motion to Dismiss based on the Court's denial of the Petitioner's right to a speedy trial.

It must also be pointed out that it is not the duty of the Petitioner to inform the Court that the trial court or the State has violated the speedy trial rule. In Utterback v. State (1973) ___IND.APP. ____, 300 N.E.2d 688, Defendant's trial was set beyond the required time period and Defendant apparently did not inform the Court as to this fact when the trial date was set. Defendant had previously filed a timely motion for a speedy trial. In holding that it was not the province of the Defendant to inform the trial court of its violation of the speedy trial rule, the Court of Appeals for the Second District stated:

"We do not perceive the protections afforded by rule C.R. 4(B) to require a Defendant to familiarize the prosecutor and the court with critical procedures. It is the responsibility of the State to prosecute and prosecute properly. The Appellant need not provide the instructional manual for the construction of his prison cell." at p. 689

In the case at bar, it is evident that the Court recognized that the trial date setting of November 8, 1976, was beyond the time period required by C.R. 4(B), for the Court specifically stated that the delay was being granted to allow new counsel time to prepare his case for trial. Also, Petitioner's counsel brought to the Court's attention that even though he was withdrawing, the Petitioner was not in any way waiving his rights to a speedy trial.

The Court, in resetting the trial to the November date, cited the fact that there were cases already on the calendar which could not be reset and, therefore, set the Petitioner's trial on November 8, 1976, evidently the first date available for trial. However, it is clear from C.R. 4(B) that whenever a delay is necessitated by court congestion, the prosecutor must file a timely Motion for Continuance as under C.R. 4 (A), which provides:

"(A) Defendant in jail. No Defendant shall be detained in jail on a charge, without a trial, for a period aggregate embracing more than six (6) months from the date the criminal charge against such Defendant is filed, or from the

date of his arrest on such charge [whichever is later]; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the Court calendar; provided, however, that in the last mentioned circumstance, the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to the trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor. Any Defendant so detained shall be released on his own recognizance at the conclusion of six (6) month period aforesaid and may be held to answer for a criminal charge against him within the limitations provided for in subsection (C) of this rule."

It is clear from the record in this case, that no motion at all was ever filed by the prosecutor.

In summation, the Petitioner is under no affirmative duty to object to a trial date set beyond the statutory period required for a speedy trial under C.R. 4(B). C.R.4(B) is a codified implementation of what a Defendant must do to secure his right to a speedy trial. The steps enumerated by the rule are as follows:

(1) the Defendant must make a motion for a speedy trial; and,

(2) the Defendant must avoid continuances or delays procured by or attributable to his own affirmative action.

If the Petitioner complies with the above requirements, and is not brought to trial within seventy (70) days, the rule explicitly states that "he shall be discharged". There is no mention of a further duty to aid the prosecutor by pointing out that the trial is set beyond the seventy (70) day period.

The speedy trial provisions were enacted to prevent this very situation. The Prosecutor in this case was fully aware of the time limits, yet saw fit to ignore them.

> "Though negligence or inadvertence is weighted less heavily against the State than is purposeful delay in bringing Defendant to trial, such negligence or inadvertence must be considered in determining whether Defendant has been denied his constitutional right to a speedy trial." Springer v. State (1978) ___IND.___, 372 N.E.2d 466.

If this is allowed to happen, the Defendant is being punished for failing to point out to the Court that the Prosecution was not following the statutory rules.

> "Ultimate responsibility for affording speedy trial rights rests with the government rather than the Defendant." Springer v. State, Supra.

The above-described series of events is fundamentally in error.

> "The Sixth Amendment specifically applies to the rights of the accused, not to those of the State." State ex rel Knox v. Shelby County Superior Court 259 IND. 554, 290 N.E.2d 57.

There can be no doubt in the instant case that the trial court did not set the case for trial within the time period prescribed by C.R. 4(B). The Petitioner did not acquiesce in a trial setting outside the period of the rule, nor did he cause any delay in his being brought to trial within the period of the rule.

III. The Evidence Introduced by the State Was Insufficient to Sustain a Conviction According to Applicable State Law.

In the State of Indiana, it is not the province of the appellate courts to re-hear evidence and make a de novo finding as to said evidence. Rather, it is the function of the appellate courts to review the evidence and to determine if the evidence presented was sufficient to support the verdict of the trier of fact. In Roberts v. State (1978) ___IND.___, 375 N.E.2d 215, the Court held that:

> "On an appeal from a criminal conviction, the reviewing Court will look only to the evidence most favorable to the State and all reasonable inferences therefrom; and conviction will be affirmed if there is substantial evidence of the probative value to support the verdict of the jury."

This statement of law was strengthened by the case of Metcalf v. State (1978) ___IND.___, 376 N.E.2d 1157, and also by the case of Tessely v. State (1978) ___ IND.____, ____N.E.2d_____, which stated that:

> "When reviewing the sufficiency of evidence to support a verdict, the Supreme Court does not re-weigh evidence or adjudge credibility of witnesses, but, viewing the evidence most favorable to the verdict, the Court determines whether there was

> "sufficient evidence of probative value from which the jury could have determined that the defendant was guilty beyond a reasonable doubt."

From the above-cited cases, it becomes clear that the appelate courts do not wish to interject their interpretation of the facts for that of the trier of facts. However, they also do not intend to allow the verdict to be based on mere speculation. In Shutt v. State (1977) ___IND.___, 367 N.E. 2d 1376, it was held that:

> "In reviewing the sufficiency of evidence to sustain a conviction, the Supreme Court must accomodate for the possible unreasonableness of the fact-finders verdict; if the inference drawn by the trier of facts must rest on speculation or conjecture, it cannot be drawn beyond a reasonable doubt and the Supreme Court is required to set it aside."

In the case at bar, the Petitioner is charged with the crime of accessory before the fact to the crime of robbing a bank by putting in fear employees of the bank. It is true that it is not necessary for the State to prove that the accused knew of each separate action of his confederate to sustain a conviction.

> "It is not necessary for the accused to know, subjectively, of each separate action of his confederate resulting in the offense, for the accused to be

"convicted of being an accessory before the fact..." Tessely v. State, supra.

However, the State must prove the Petitioner aided the principal, Edwin Millican, in the commission of the crime. Toodlow v. State (1973) 270 IND. 552, 297 N.E.2d 803; Tessely v. State, supra.

In the case at bar, the testimony of both the Petitioner and the principal, Edwin Millican, conclusively established that Petitioner was picked up by the principal while hitch-hiking, and, at best, the Petitioner could only be considered a companion of the principal. Edwin Millican testified that he never informed the Petitioner of his intentions to rob the bank and did state that when he drove into the Town of Andrews, where the bank was, the Petitioner was asleep in the front seat (this sleep may have been the result of the amount of alcohol the Petitioner consumed while riding around with Edwin Millican prior to Millican's driving to Andrews).

Petitioner was present at the scene only because he drove the car from behind the bank, where Edwin Millican had parked it, to look for Millican. When he observed Mr. Millican in the bank with a shotgun, he honked the horn of the car to signify that he was leaving. He then drove away. Although, the action of the Petitioner in honking the car's horn was portrayed as a signal to the principal by the State, the testimony of Edwin Millican at the trial shows otherwise:

"Q. [Mr. Boonstra] When you left the vehicle, was Mr. Wine awake?

"A. No, sir, he was asleep.

"Q. Okay, after you got there to the corner, what did you do?

"A. I went into the bank-you know-to rob the bank, and well, I was robbing-I heard the horn, you know, later on. I don't know what it was-I was expecting nobody to be around, and I asked the people if they had a back door.

"Q. Why did you ask the people there if they had a back door?

"A. Well, I was going out the back door and back in before I came right our back in the car."

Direct examination of Edwin Millican (Tr., p.185, l.5-18)

Thus, the testimony shows that the principal did not expect the Petitioner to be a lookout or a getaway driver, or anything of that sort. Edwin Millican expected the car to be in the back of the bank where he had parked it with the motor running and the Petitioner fast asleep on the front seat. Furthermore, the testimony of Edwin Millican and the cross-examination shows that he was expecting to find the car still parked in the back.

"Q. [Mr. Mills] I show you State's Exhibit 7 marked-take that in your hand and examine-does that faithfully portray you during the bank roberry?

"A. U-hm.

"Q. What you are doing is jumping the counter?

"A. Yes, I was looking for a way out the back."

Cross-Examination of Edwin Millican (Tr., p. 179, p. 180.)

The facts of the case, as viewed most favorably to the State, indicate that Petitioner's only connection with the crime is his presence at the scene of the crime and his failure to act to prevent the crime once he realized it was occurring. However, more than mere presence at the scene of the crime or failure to deter the crime (absent any duty) is required to convict the Petitioner of accessory of a crime.

> "Presence at the commission of a felony and association with principals are not alone sufficient to constitute one as an accessory..." Pinkler v. State (1977) ___IND___, 364 N.E.2d 126.

> "Mere negative acquiescence in the crime is insufficient to support an accessory conviction and there must be some course of conduct of an affirmative nature connecting the defendant with the crime, unless

> "the person who fails to oppose the crime owns a duty to protect." Bigbee v. State (1977) ___IND___, 364 N.E.2d 149.

Later, in Rogers v. State (1978) ___ IND___, 373 N.E.2d 125, the Courts re-affirmed the above position by holding that:

> "More than mere presence is necessary to sustain a conviction under the accessory statute."

In a 1978 Indiana case, it was held that:

> "The trier of fact may infer participation from a defendant's failure to oppose crime, companionship with another engaged therein, and in a course of conduct before and after the offense." Young v. State (1978) ___IND___ 373 N.E.2d 1108.

However, Young is distinguishable by its facts. In Young, the Defendant entered and left the scene of the robbery together with the co-defendants and it was clear from the Court's holding that the defendant played an integral part in the robbery scheme. While in the case at bar, it is clear that the Petitioner was never an integral part of any scheme, and in fact there is no evidence of any probative value to link the Petitioner to the robbery in this cause.

In the case at bar, the evidence shows that Petitioner knew that there was a bank robbery in progress. However, there is no evidence in record which shows that Petitioner had a duty to oppose that robbery. The

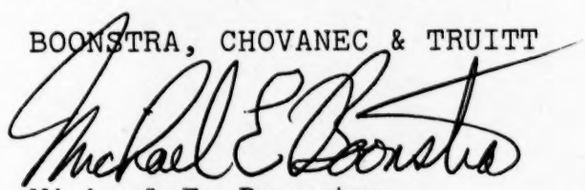
record conclusively shows that Petitioner did nothing to aid or abet the robbery of the bank. Petitioner was not a getaway driver nor was he a lookout. Petitioner's only crime was to accept a ride from the wrong person and to be in the wrong place at the wrong time.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Indiana.

Respectfully submitted,

BOONSTRA, CHOVANEC & TRUITT



Michael E. Boonstra
P.O. Box 352
145 East Morse Street
Markle, IN 46770
(219) 758-3151
Counsel for Petitioner

February 16, 1979

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House
Indianapolis, IN 46204
(317) 633-5200

No. 2-677A240

BOBBY DEAN WINE

V.

STATE OF INDIANA

You are hereby notified that the Supreme Court has on this day Appellants Petition for Transfer denied without Opinion.

Givan, C.J.

All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 22nd day of November, 1978.

Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

"Appendix A"

STATE OF INDIANA)
) SS:
COUNTY OF HUNTINGTON)

IN THE HUNTINGTON CIRCUIT COURT 1976 TERM

STATE OF INDIANA)
)
VS.)
)
BOBBY DEAN WINE)

CAUSE NO. CR-76-44

VERDICT

"We, the jury, find the defendant, BOBBY DEAN WINE, guilty of the crime of Accessory Before the Fact of Bank Robbery, as charged in the information, and that his true age is 21 years."

Ronald E. Lund
Foreman

The jury is polled and dismissed. The Court now adjudges that the defendant is guilty of being an Accessory Before the Fact of Bank Robbery as charged in the information in this cause. Sentencing is now set for 10:00 A.M. on November 29, 1976.

The Court now files all instructions together with all written memoranda endorsed thereon and makes the same a part of the record in this cause.

The Probation Officer is directed to prepare and file a presentence report.

The defendant is ordered returned to the custody of the Sheriff of Huntington County, Indiana. DM

November 24, 1976. Comes now the Probation Officer for Huntington County, Indiana,

"Appendix B"

and files presentence investigation and report on BOBBY DEAN WINE, which report is examined and considered by the Court.

November 29, 1976. Comes now the State of Indiana by William N. Mills, Prosecuting Attorney. Also comes now the defendant in person and by counsel.

IT IS NOW ORDERED AND ADJUDGED by the Court that the defendant, BOBBY DEAN WINE, having been adjudged guilty of the crime of Accessory Before the Fact of Bank Robbery as charged in the information in this cause do make his fine to the State of Indiana in the penal sum of zero dollars and that he be committed to the Department of corrections for classification and confinement for a period of 10 years and that he be disfranchised and rendered incapable of holding any office of trust or profit during such term of imprisonment and that he pay and satisfy the costs herein. The Court finds that the defendant is indigent and orders that the defendant not be imprisoned for failure to pay costs herein. The defendant shall receive 139 days credit toward the above sentence of imprisonment for time spent in confinement prior to sentencing, which shall be good time.

It is further considered, ordered and adjudged by the Court that the defendant be and is hereby remanded to the custody of the Sheriff of Huntington County, Indiana for execution of the order of commitment and for delivery of the defendant to the Reception Diagnostic Center at Plainfield, Indiana. Commitment ordered issued. DM

Appendix B continued.

January 31, 1977. Comes now the defendant by counsel and files Motion to Correct Errors. The Court takes notice that because of inclement weather, the Court was closed on the 28th day of January and also on the 29th day of January, 1977. Hearing on defendant's Motion to correct errors is set for 11:00 A.M. on February 28, 1977. Notice ordered.

February 28, 1977. Defendant's Motion to correct errors came on for hearing. Arguments heard. Defendant's motion to correct errors is overruled and denied.

Michael T. Boonstra is hereby appointed to process and perfect an appeal for the defendant.

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House
Indianapolis, IN 46204
(317) 633-5200

No. 2-677A240

Wine v. State

You are hereby notified that the Indiana Court of Appeals has on this day issued the enclosed Opinion.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 19th day of June, 1978.

Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

"Appendix C"

ATTORNEY FOR APPELLANT:	ATTORNEYS FOR APPELLEE:
MICHAEL E. BOONSTRA 504 West State Street Huntington, Indiana 46750	THEODORE L. SENDAK Attorney General of Indiana CHARLES D. RODGERS Deputy Attorney General Office of Attorney General 219 State House Indianapolis, Indiana 46204

IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

BOBBY DEAN WINE, Appellant (Defendant Below), -vs- STATE OF INDIANA, Appellee (Plaintiff Below).	)	No. 2-677-A-240

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Dane Mann, Judge

BUCHANAN, C.J.

MEMORANDUM DECISION

Defendant-appellant, Bobby Dean Wine (Wine) appeals from a conviction of Accessory Before the Fact[1/] to Bank Robbery, claiming insufficiency of the evidence and trial court error in overruling Wine's Motion for Discharge and in allowing the introduction into evidence of a photograph of a sawed-off shotgun.

We affirm.

The facts most favorable to the judgment reveal:

On the morning of July 14, 1976, Wine was hitchhiking along Route 24 near Huntington, Indiana, and accepted a ride with Edwin Millican (Millican). Millican told Wine he was driving into Andrews, Indiana, to cash a check. During the drive the two men were drinking liquor and Wine subsequently fell asleep.

1. Ind. Code 35-1-29-1 (Burns 1971). Repealed by 1976 Ind. Acts, P.L. 148, § 24.

Upon arriving in Andrews, Millican parked his car and entered the bank carrying a sawed-off shotgun. While Millican was robbing the bank, Wine pulled the car around in front of the bank window and began honking and waving at Millican. Ray Williams, the town marshal, approached the car from behind with his gun drawn and ordered Wine to pull over to the curb. Wine nodded but instead drove away at a high rate of speed. The marshal then apprehended Millican.

Wine was arrested in Wabash, Indiana, and charged by information with the crime of Accessory Before the Fact to Bank Robbery. On August 9, 1976, Wine filed his Motion for a Speedy Trial.[2/] The motion was granted and the jury trial was set for October 5, 1976.

On September 22, 1976, Wine's attorney withdrew due to a possible conflict of interest. The

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2. Ind. R. Cr. P. 4(B).

trial court judge appointed Stephen J. Michaels to represent Wine and made a finding that the new attorney would need additional time to prepare, therefore, the trial was reset for November 8, 1976. The trial court judge also noted that a congested trial calendar prevented an earlier trial date.

Stephen J. Michaels refused to accept the appointment, consequently, on September 22, 1976, the court appointed Michael E. Boonstra to represent Wine. Boonstra filed his appearance on October 19, 1976, and on the same date filed a Motion for Discharge for Delay. The affidavit of John Snively, Wine's first counsel, was submitted in support of the motion, and stated in pertinent part:

> affiant [John Snively] stated in Open Court during said proceedings, in substance, that the Court's continuance of the Defendant's trial date as aforesaid was not to be construed as a waiver of the Defendant's right for an early trial pursuant to the provisions of Rule CR 4 (b).

The court denied the motion and found Wine was prepared to go to trial on November 8, 1976. The jury returned a verdict of guilty and Wine was sentenced to ten (10) years of confinement.

Three issues are raised for our consideration:

1. Did the trial court err in overruling Wine's Motion for Discharge?
2. Did the trial court err in allowing the State to introduce the photograph of a sawed-off shotgun into evidence over Wine's objection?
3. Was there sufficient evidence to support the conviction?

I. MOTION FOR DISCHARGE

The trial court did not err in overruling Wine's Motion for Discharge because Wine acquiesced in the setting of a trial date beyond the seventy

(70) day time limit.

CR. R. 4(B)(1) provides in pertinent part:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. . . .

Case law has also determined that a defendant may be deemed to acquiesce in the setting of a trial date beyond the seventy (70) day limit by failure to object at the first opportunity.

In Utterback v. State (1974), 261 Ind. 685, 310 N.E.2d 552, the defendant filed a Motion for an Early Trial, however, the trial date was set beyond the time limit established in CR. R. 4(B)(1).[3/] On the day of the trial the defendant

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3. Prior to its amendment in 1975, CR. R. 4(B)(1) provided a fifty (50) day time limit, using only judicial days.

moved for discharge for delay and the trial court denied the motion.

In affirming the trial court's decision the Supreme Court stated:

> when a ruling is made that is incorrect, and the offended party is aware of it, or reasonably should be presumed to be aware of it, it is his obligation to call it to the court's attention in time to permit a correction. If he fails to do so, he should not be heard to complain. The courts are under legal and moral mandate to protect the constitutional rights of accused persons, but this should not entirely relieve them from acting reasonably in their own behalf. We will vigorously enforce the right to a speedy trial, but we do not intend that accused persons should escape trial by abuse of the means that we have designed for their protection.

Id. at 687-88, 310 N.E.2d at 554.

Likewise, in Hardy v. State (1976), ___ Ind. App. ___, 354 N.E.2d 342, this Court held that the defendant's Motion for Discharge, not having been made until more than three months after the time

that the court fixed the trial date, came too late.

Wine cites Simpson v. State (1975), ___ Ind. App. ___, 332 N.E.2d 112, in support of his contention that once a defendant has filed a Motion for an Early Trial, he has no further affirmative duty. However, Simpson may be distinguished on its facts.

Simpson filed a Motion for an Early Trial on three causes, however, the trial court took no action in setting the causes for trial. A change of counsel occurred and the court, on its own motion, delayed the setting of a trial date on the assumption that the new counsel would require additional time for preparation. Approximately two months after the time limit for an early trial, Simpson tendered a Motion for Discharge which was overruled.

In reversing the trial court's denial, the Court of Appeals stated the trial court had an

affirmative duty to see that the causes were set for trial within the period established by CR. R. 4(B)(1) and that the defendant's failure to apprise the court of the running of the time period did not constitute waiver or acquiescence.

In the present case, the trial date as originally set was within the seventy (70) day time limit. However, upon the necessity of appointing new counsel the court on its own motion set the cause for trial beyond the time limit imposed. Although Wine submitted the affidavit of John Snively, Wine's original counsel, swearing that at the time Snively withdrew he stated that the court's continuance of the trial was not to be construed as a waiver of Wine's right for early trial, such statements do not appear in the record, therefore, we are unable to determine whether these statements constituted an objection to the later trial date.

Further, Wine had ample opportunity (3 weeks) to object after the trial date was reset and before the expiration of the seventy (70) day limitation, therefore, he is deemed to have acquiesced in the setting of a trial date beyond the seventy (70) day time limit.

II. ADMISSION OF PHOTOGRAPH

The admission into evidence of the photograph of the sawed-off shotgun used in the perpetration of the bank robbery did not constitute reversible error.

The admission into evidence of a photograph is within the sound discretion of the trial court and the court's ruling will not be disturbed unless abuse is found. Owens v. State (1975), 263 Ind. 487, 333 N.E.2d 745; New v. State (1970), 254 Ind. 307, 259 N.E.2d 696.

Even assuming the admission of the photograph constituted error, reversal may not be grounded

upon the erroneous admission of evidence when other evidence of the same probative value is admitted without objection. Bobbitt v. State (1977), ___ Ind. ___, 361 N.E.2d 1193; Boles v. State (1973), 259 Ind. 661, 291 N.E.2d 357.

The State offered another photograph of Millican holding the sawed-off shotgun (State's exhibit 7) and several witnesses testified regarding the use of the sawed-off shotgun without objection. Therefore, admission of the photograph in question did not constitute reversible error.

III. SUFFICIENCY

Wine's affirmative conduct provided sufficient circumstantial evidence of probative value to support the conviction of Accessory Before the Fact to Bank Robbery.

Mere presence at the scene of the crime is insufficient to support a conviction of Accessory Before the Fact. Lipscomb v. State (1970), 254 Ind. 642, 261 N.E.2d 860; Pack v. State (1974), ___ Ind.App. ___, 317 N.E.2d 903. There must be

some affirmative conduct from which the jury can reasonably infer that the defendant had knowledge of and participated in the commission of the crime. Conrad v. State (1977), ___ Ind.App. ___, 369 N.E.2d 1090; Pruitt v. State (1975), ___ Ind.App. ___, 333 N.E.2d 874. Furthermore, a jury may infer guilt from circumstantial evidence and evidence of flight or avoidance of arrest is admissible on the issue of guilty knowledge or intent. James v. State (1976), ___ Ind. ___, 354 N.E.2d 236; Johnson v. State (1972), 258 Ind. 683, 284 N.E.2d 517; Boles v. State, supra.

The evidence clearly establishes that Wine honked and waved to Millican through the bank window, disobeyed the marshal's order to pull over, and drove out of town at a high rate of speed. These affirmative acts constitute substantial circumstantial evidence of probative value sufficient to support a conviction of Accessory

Before the Fact to Bank Robbery.

The judgment of the trial court is therefore affirmed.

SULLIVAN, J. CONCURS.

STATON, J. (by designation) CONCURS.

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House
Indianapolis, IN 46204
(317) 633-5200

No. 2-677A240

Wine V. State

You are hereby notified that the Indiana Court of Appeals has on this day Denied Appellants Petition for Rehearing. Buchanan, Jr. C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 25th day of August, 1978.

Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

"Appendix D"